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3 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
4 IN AND FOR COCHISE COUNTY
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7 RODNEY and GLORIA OLSON,)
8 Plaintiffs,
9 vs) CV201600084
10 CHULA VISTA HOMEOWNERS
11 ASSOCIATION. Defendants.)
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14 REPORTER'S TRANSCRIPT OF PROCEEDINGS
15 CONTINUATION OF BENCH TRIAL (DAY 2 OF PROCEEDINGS)
16 AUGUST 15, 2017
17 BEFORE THE HONORABLE CHARLES A. IRWIN
18 SIERRA VISTA, ARIZONA
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23 Reported by: KATHRYN ANDREW, RPR/CCR
24 Certified Court Reporter #50231
25

APPEARANCES:

For the plaintiffs: R. STACHEL, Attorney at Law

For the defendants: J. SMITH/N. TENNESON, Attorneys at
Law

The parties were personally present

1 AUGUST 15, 2017

2 THE HONORABLE JUDGE A. IRWIN PRESIDING

3 -oOo-

4 THE COURT: We're back on the record in the matter
5 of Olson versus Chula Homeowners Association.

6 The plaintiff is present with counsel and respondent
7 and the defendant counterclaimant is present with counsel as
8 well.

9 I believe we've completed the plaintiff's case as of
10 close of business last night and defense wishes to call their
11 first witness.

12 MR. TENNESON: Yes. I will call Ms. Cunningham to
13 the stand but Mr. Smith has a couple of questions.

14 THE COURT: The court was provided this morning with
15 an amended 250.

16 MR. TENNESON: And that is Ms. Cunningham. It's in
17 that front pocket.

18 THE WITNESS: Okay.

19 MR. STACHEL: The witness has been sworn before. Go
20 ahead.

21 DEBORAH CUNNINGHAM,

22 having been previously sworn testified further as
23 follows:
24
25

1 DIRECT EXAMINATION

2 BY MR. TENNESON:

3 Q. Ms. Cunningham going over some stuff you have been
4 asked this morning, if you could state your name.

5 A. Deborah Jane Cunningham. I am a realtor.

6 Q. What do you do?

7 A. I list and sell houses and land within Concise
8 County.

9 Q. How long have you resided in Chula Vista?

10 A. We built our house in 2008 and we bought the land in
11 2005.

12 Q. It took you three years for construction?

13 A. Correct.

14 Q. What happened before you were able to finish the
15 home?

16 A. When we first bought the land, we had figured out
17 where we were going to put the house on it and get plans
18 because it's a custom home.

19 And to get with the architect and builder takes
20 quite a long process and go to the contractor to make sure
21 the building is okay.

22 And we submitted an architectural review to the
23 board, waited for that to be approved and we broke ground and
24 started building. I think it was in beginning of 2008.

25 Q. How long have you served on the board or been on

1 board positions?

2 A. I first served on the board from 2005 to 2007 and
3 again from 2009 to 2011 and then I came on temporarily as a
4 secretary in 2015 when Chancey Broom (phonetic) left because
5 of health issues.

6 And I was re-elected at the annual meeting that was
7 in December 2016.

8 Q. Regarding Chula Vista, what is that like as a
9 community?

10 A. It is a really nice community. It is a very close
11 knit community.

12 Most of the homeowners have similar ideas, ideals
13 and we get together quite a lot.

14 We have afternoon teas, social events and pot lucks
15 and progressive dinners, all sorts of things.

16 We come together quite frequently and we work on
17 road projects and ditch projects, anything that needs to be
18 done to get a working party together so it's a very close
19 knit community.

20 Q. I am sure you know other boards members and people
21 who have served.

22 What is the long term view for Chula Vista as a
23 community; any goals?

24 A. We would like to see all of the lots developed in
25 keeping with the rest of the neighborhood. It would be very

1 nice to have the community filled.

2 Q. You state that it makes it sound like there are a
3 number of vacant lots left. What is the development ratio
4 for it?

5 A. I believe we have 28 homes and we've got one that is
6 being built right now and we have in total 81 lots and nine
7 acre lots minimum, but some people have 18 acres.

8 There is one homeowner that has 45 acres who
9 recently split it up and put them up for sale. We have 81
10 lots.

11 Q. How many were developed?

12 A. About 28 and we have one home that is being built
13 right now.

14 Q. Drawing your attention to exhibit 9 --

15 THE COURT: Exhibits 1 through 50 have been
16 stipulated and are all in evidence. Go ahead.

17 Q. -- take us to page 14.

18 A. Yes.

19 Q. Do you recognize that document?

20 A. I do.

21 Q. What is that?

22 A. It's Protective Covenants for Chula Vista Homeowners
23 Association.

24 Q. Drawing your attention to section 2, could you read
25 that section for me?

1 A. Yes. "No improvement or structure whatsoever other
2 than first class site built private dwelling, house patio
3 wall and customary outbuildings, garages, carports or
4 guesthouses may be erected, placed or maintained on any
5 property such as these restrictions.

6 It is understood that required use paragraph shall
7 exclude the use of the following types of structures:
8 manufactured homes, modular homes, mobile homes, trailers, A-
9 frame homes, geodesic dome homes or any other non-traditional
10 homes or facade.

11 This restriction is not intended to exclude homes
12 built with non-traditional building material such as adobe,
13 round earth or straw bales."

14 Q. For practical purposes, how does the association
15 enforce this particular restriction on design?

16 A. We require all homeowners to submit an architectural
17 review for any structure that is placed on the property and
18 anything that may need verification of setbacks or anything
19 else within the protective covenants.

20 We have one member of the board, a member at large.
21 He was the architectural review person and they receive the
22 paperwork and go out and pull the building permits and
23 they will go and ask for elevations, plans, anything they
24 require.

25 And they go out to the site and they look at the

1 site and check the setbacks and make sure everything is as it
2 should be and then present it to the board.

3 And, in a meeting, the board then discusses the
4 merits of the home or the structure and makes a decision as
5 to whether it would be approved or not.

6 Q. I can see two situations arising from that. Let's
7 say an owner applies and gets approved.

8 What is the general process after approval?

9 A. They have nine months to a year to build their home,
10 so if they haven't already submitted a building permit
11 they have access to it.

12 They have a certain amount of time to produce a
13 building permit and in that case it would not be fully
14 approved until we have a building permit.

15 Once they start breaking ground, they started
16 building, if that exceeds the nine months to a year, we do
17 allow for a variance to extend that in three month periods
18 so they can remain in a temporary mobile home or trailer
19 until the building project is finished.

20 Q. In your experience, do most owners need to extend
21 the variance?

22 A. Occasionally, especially if it is an owner built,
23 when you have got -- your commercial builder comes out;
24 they have a work crew and they get work done much faster and
25 it depends on the size of the building and the intricacies of

1 the building.

2 Q. How does the board usually handle requests for a
3 variance?

4 A. We're very friendly for variances. If there is any
5 way we can give a variance, we'll try and make it happen and
6 that's not just when I am on the board, but every single
7 board.

8 Q. Let's say an owner submits and it gets disapproved.
9 What is the general process after the disapproval;
10 how does the board and the owner handle that?

11 A. If the board was to disapprove it, the number at
12 large would then meet with the homeowner or e-mail or
13 contact in some way the homeowner and discuss the reason it
14 was disapproved.

15 If the homeowner at that time wants to still go
16 forward and still try to work with that project, we ask them
17 to come to the board and discuss it with the board so we
18 can try to find a way to make it happen if possible by
19 giving a variance or by changing some things to make it more
20 suitable.

21 Q. Sounds like to me that in general in this process,
22 the board does its best with the homeowner to make sure that
23 things are done correctly and properly?

24 A. Absolutely.

25 Q. If we could go through section 2 and break down a

1 couple terms.

2 The first and the most debated in this case is first
3 class.

4 How does the association go about determining or the
5 board determines if something is first class?

6 A. Well, we go back to -- there always has been
7 continuity on the board.

8 So in 2004 we've always looked at what was the
9 intent at that point and some of those board members are
10 still existing in the community and if we have any questions,
11 we often refer back to them and because they changed it and
12 there was a reason they changed it, we discuss it with them
13 if necessary.

14 But usually there is continuity from one board to
15 the next and somebody on that board knows what the previous
16 board had discussed.

17 So first class what we are looking for is something
18 that is higher and better than the standard building.

19 We don't -- if it is vague -- I don't think it is
20 vague necessarily. It is just the way it is written to allow
21 for different people to build different homes.

22 Q. Vague is a legal term. When the board is looking
23 for it, what determination does the board use when
24 determining if a house or dwelling is first class?

25 A. We're looking for something that is especially

1 pleasing and something that is in keeping in the neighborhood
2 very beautiful, and, we are looking for similar types of
3 homes and they can vary in style but they have to match the
4 ascetics of the community.

5 Q. The association doesn't require a certain kind of
6 building like a Sante Fe?

7 A. No. We have several Sante Fe homes. We have a
8 Mediterranean home and colonial style home and several ranch
9 style homes.

10 They vary as to what people would like to build
11 themselves.

12 Q. Section 2 goes on to talk and exclude some
13 particular types of buildings.

14 Touching on those, what does the board consider a
15 manufactured home to be?

16 A. That is a home hopefully build on site and
17 transported and placed on the property and usually there is
18 not a foundation in place for that. It is just brought in
19 and tied down.

20 Sometimes you can put a V.A. foundation but that is
21 it. Not really a standard foundation for a site built
22 home.

23 And modular home, it is factory built. So it is
24 prefabricated and comes in sections so certain sections of it
25 and they will bring both sections in and quite often place it

1 on a slab and build the sections together on site.

2 Q. I don't know -- what is a mobile home?

3 A. A mobile home is a type of manufactured home that
4 existed before 1978; a trailer like single wide.

5 Q. What is an A-frame home?

6 A. An A-frame, a roof style structure.

7 Q. I think geodesic dome speaks for itself.

8 Drawing your attention to exhibit 44, do you
9 recognize this building?

10 A. I do.

11 Q. Which one is this?

12 A. This is the Olson's outbuilding.

13 Q. Do you know approximately where that picture was
14 taken?

15 A. Yes. It was taken on the Olefather's (phonetic)
16 property which borders on the east.

17 Q. I think you are familiar with the respective in the
18 area.

19 Do you know approximately where that was taken?

20 A. It was taken on the Olefather's property which
21 borders on the east.

22 Q. Showing you this --

23 A. This is the Olson's property here and the
24 Olefather's property is here (witness indicates.)

25 Q. If you had to classify this as a type of home, what

1 would this be from section 2?

2 A. That is a pre-fabricated outbuilding.

3 Q. Going over this property a bit -- so this is the
4 Olson property and drawing your attention to exhibit 33 would
5 you identify this?

6 A. This is a Chula Vista home and association
7 architectural review request from Mr. and Mrs. Olson and it
8 was from 2009 with the stucco house and the Shocks
9 building.

10 Q. Which part of this plan is this?

11 A. That is the shop.

12 Q. To date, has the other primary residence been built
13 on this lot?

14 A. It has not.

15 Q. When was this application approved?

16 A. It was approved on the 9th of June 2, 2009.

17 Q. What was approved?

18 A. What was approved was the outbuilding and the future
19 home.

20 Q. As you stated, the primary residence hasn't been
21 built.

22 Assuming that the Olsons had applied for that
23 warehouse, would the association have approved this
24 application, the steel structure?

25 A. Most likely not because we require them to either be

1 built at the same time or the house to be built not too much
2 later.

3 Q. Is it fair to say the association approves or
4 requests like on the totality of the material submitted?

5 A. Correct.

6 Q. After approval of this application, what was the
7 general process surrounding this application?

8 A. When this one came in, I was the president and the
9 member at large was Bob Covalucci.

10 He looked at it and he came to the board and said
11 this is quite a large structure but we don't have anything in
12 the CC&Rs that prevent the size of it and it is an
13 outbuilding but the home and the building look very nice.

14 And the position of it would have screened most of
15 the east side which would have had an effect on the
16 Olefather's property. So it would actually screen the
17 structure.

18 I don't think any of us have any idea what a hundred
19 by sixty was going to look like, but it is the largest
20 structure.

21 So we discussed quite at length whether it would be
22 a customarily outbuilding or not.

23 And at the end of the day, we decided we did not
24 have enough in the CC&Rs to disallow it as an outbuilding.

25 Q. The approval was conditioned on the primary

1 residence being rather nice?

2 A. Absolutely.

3 Q. Exhibit 19, what is that?

4 A. This is the Chula Vista Home Owners' Association
5 architectural review request from Mr. and Mrs. Olson for
6 a temporary residence sense inside the existing metal
7 building.

8 Q. What is your understanding of why a variance was
9 requested to have a temporary residence inside the
10 warehouse?

11 A. They said they were having financial difficulties
12 and couldn't at this point build their home.

13 They needed some more time to get financing and they
14 needed to have somewhere to stay while they got the financing
15 together.

16 Q. Looking at the application that was disapproved.

17 Could you go over some of the reasons for the
18 reasons for the disapproval for all the reasons?

19 A. Number one, it didn't meet the CC&Rs of a first
20 class site class building.

21 When the board met, I had not written first class,
22 so we could change that later, but it didn't meet the CC&Rs
23 as a first class site building dwelling requirement.

24 The reason we put that in when we pulled the
25 building permits it was for a single family residence issued

1 as a permanent residence so the county does not allow this
2 type of structure for a temporary residence.

3 They only allow one outbuilding on the property
4 before the permanent residence is put in place so they could
5 not go to the county and ask for a temporary residence.

6 They would have to ask for a permanent residence but
7 when it is on the county as a permanent that is a primary
8 residence and this did not meet the requirements in the CC&Rs
9 for a first class site built dwelling so they were requesting
10 a temporary residence with us.

11 It was actually on record as a primarily residence
12 so it could not possibly meet the standard.

13 And again the county and CC&R requirements for a
14 temporary residence would be a mobile home or a trailer that
15 you live in for nine to twelve months prior to building or
16 while you are building and it didn't meet that requirement
17 either.

18 Q. Are you able to expand?

19 You said that CC&Rs prohibited the temporary
20 variance from being located inside the warehouse. Tell us
21 more.

22 A. An outbuilding, be it site built, it is a
23 pre-fabricated outbuilding.

24 It is not a first class site built residence or
25 pleasing to look at so it does not meet the requirements for

1 that.

2 So if you put a residence within that, then we
3 have a situation where along the road somebody could say I
4 have already built my home here, so I am just going to stay
5 here.

6 There was a lot of concern at the time that that
7 might actually happen if we issued a variance for a short
8 period of time.

9 However, we were very empathetic towards the Olsons
10 and we tried to work something out so we could allow them to
11 live in the outbuilding.

12 We couldn't issue them an approval for the
13 temporary residence obviously because it didn't meet our
14 requirements, but we felt as if we could offer them a
15 variance to live in there short term, that might help them
16 out.

17 Q. If we could, the board and association wanted to
18 work on it with a variance.

19 Was the board able to work anything out with the
20 Olsons in that regard?

21 A. Yes, indeed. There was lots of back and forth.

22 The board really did not want to issue the
23 variance.

24 They were very, very concerned about these issues
25 but we wanted to help our neighbors out.

1 I worked very hard to work with the board to try and
2 find a way to make this work and we decided that if we were
3 going to issue a variance, we would have to have the Olsons
4 ask the neighbors that surrounded the area whether they would
5 approve it.

6 And we would take that into account when we decided
7 to issue the variance or not.

8 And one board member said we can't issue a variance
9 and not give an end date because you're basically saying they
10 can live there forever.

11 And another board member had stated that there was
12 nothing to prevent them from just classifying that as a
13 primary residence unless we had a statement from them stating
14 exactly what their intent was.

15 And the Olsons did send us a an e-mail and sent
16 e-mails to all of the neighbors advising us all that this was
17 very temporary, that they did not intend to live in it, that
18 once their home was built and they intended to build a nice
19 home in keeping with the rest of the community.

20 Once that was built the residence inside the
21 warehouse would then be turned back into workshop space.

22 And they sent an e-mail to the homeowners, to us,
23 and also sent a statement to us with that.

24 Q. Drawing your attention to exhibit 35, is this the
25 e-mail that you were referring?

1 A. Correct.

2 Q. Who is this from?

3 A. It's the architectural review is what it is called
4 from Rod Olson to Deborah Cunningham.

5 "This is just meant to be our temporary residence
6 until we build our house on the east side of the metal
7 building as we proposed when we submitted to the HOA the
8 site of the existing metal building.

9 We have attached the new paperwork with the
10 corrections, temporary residence. Sorry for the
11 confusion.

12 We just thought they still had our original site
13 plan showing our future house. Thank you, Rod Olson."

14 Q. The e-mail was sent when?

15 A. February 16, 2011.

16 Q. Drawing your attention to exhibit 36, what is this
17 document?

18 A. This is the document sent to us. It was attached to
19 the e-mail and it says:

20 "C.V. HOA. We, Rod and Gloria Olson are asking for
21 a variance to build temporary living quarters in our shop
22 until we can build our future home to the east of the shop.

23 We have every intention of building a future home
24 when funding is available.

25 Once the future residence is build, the temporary

1 living quarters will be used as a workshop again."

2 Q. With this tone, is this the way the Olsons held out
3 this temporary residence in 2011 to the board?

4 A. Absolutely. We totally believe that that was the
5 case.

6 Q. Exhibit 28 and this is an amended copy in the front
7 of the book. What is this?

8 A. There is the C.V. showing the architectural review
9 variance issued to the Olsons.

10 Q. What is the purpose behind this letter?

11 A. After the board had consulted, we decided we would
12 give them a variance for three years to reside in the
13 outbuilding to allow them time to get their financing in
14 order.

15 They would have to have board reviews once a year to
16 make sure they were actually proceeding to try and get the
17 financing.

18 Q. In that first paragraph the letter notes a couple
19 reasons why the approval wasn't granted.

20 Could you read those reasons?

21 A. "Does not meet CC&R requirements for a first class
22 site build dwelling. Building permits are issued for a
23 permanent residence and does not meet CC&Rs requirements for
24 a temporary residence."

25 Q. Paragraphs 4 and 5, the last two, would you read

1 those.

2 A. "It is the HOA board's decision to allow a temporary
3 variance for three years with annual board reviews.

4 It is understood that the HOA board is not approving
5 the architectural review for the temporary residence; simply
6 allowing a variance for its use for the next three years at
7 which time it is expected that the primary residence will be
8 built and the temporary residence removed from within the
9 workshop."

10 Q. Who executed this letter?

11 A. I prepared the letter and the board reviewed it and
12 they approved it and I took it around to the Olsons.

13 That was the one and only time I had ever been in
14 there and we went through it and Mr. Olson signed it.

15 Q. Who is "we"?

16 A. I went through it -- sorry -- with the Olsons.

17 Q. And Mr. Olson signed it?

18 A. Yes.

19 Q. During the period of the variance for 2011 to 2014,
20 did the board or association notice anything peculiar or
21 strange going on?

22 A. Apparently not. I wasn't on the board at that time
23 but, from the letters that we had back and forth, there was
24 nothing to suggest that.

25 Q. Drawing your attention to exhibit 47 or exhibit

1 45 --

2 A. Yes.

3 Q. -- would you identify this document?

4 A. This is one of the annual review letters from
5 Mr. Robert Coffman who is a member at large on the board at
6 the time to Mr. and Mrs. Olson.

7 Q. When was this sent?

8 A. April 5, 2012.

9 Q. Who was it directed to?

10 A. Rodney and Gloria Olson.

11 Q. Would you read that?

12 THE COURT: I can read; thank you.

13 Q. Drawing your attention to exhibit 47 --

14 THE COURT: Did the board receive any response to
15 this letter?

16 THE WITNESS: I do believe so because there should
17 be somewhere in here or maybe we don't have it.

18 THE COURT: To your knowledge --

19 THE WITNESS: Yes.

20 I do remember seeing something from Mr. Coffman
21 saying they had received some communication from the Olsons
22 and they were going ahead with the financing and things were
23 going well.

24 Q. Drawing your attention to exhibit 46, what was the
25 point of this letter?

1 A. This would probably have been the first one after
2 the variance was issued, so this would have been the first
3 letter to them explaining to them that the board has
4 decided to allow the temporary variance to remain in
5 effect.

6 What we explained to them was, even though the board
7 at the time was gone had allowed for the variance.

8 Each board may have a different idea so they would
9 have to review the whole situation every year, so this is the
10 board explaining to them that particular board was happy to
11 let the variance go on.

12 Q. Exhibit 47.

13 A. Yes.

14 Q. Review this letter and what was the general intent
15 of this letter?

16 A. This was a letter that the board at that time sent
17 out just to remind them that their variance was coming to an
18 end and asking them to be prepared to submit the site plans
19 and for the permanent residence.

20 Q. Did the association board ever receive a response to
21 this letter?

22 A. We did not.

23 Q. Did anything happen before the temporary variance
24 expired; was any building constructed or anything like
25 that?

1 A. Not that we were aware of, no.

2 Q. After the variance expired, how did the board
3 proceed once the variance t had expired?

4 A. I wasn't on the board at the time. Looking through
5 the minutes, they discussed it and they decided they would
6 wait and see what would happen and it expired at the same
7 time the new board was going to be coming into place at the
8 end of April.

9 So this particular board decided to roll it over to
10 the next board to handle it so they had discussion probably
11 the first main meeting in July and decided they would try
12 once again to reach out to the Olsons with a letter from the
13 management company.

14 Q. Did anything result from that?

15 A. We got no response.

16 Q. Exhibit 21?

17 A. When they got no response to the letter from the
18 management company, they decided it was time that they got
19 the lawyers involved.

20 It was difficult for us. We were facing issues from
21 angry homeowners who were saying if they did not enforce the
22 CC&Rs --

23 MR. STACHEL: Objection.

24 THE COURT: Sustained.

25 Next question.

1 Q. Exhibit 22, what is that?

2 THE COURT: What was 21?

3 MR. TENNESON: The letter to the Olsons; who was the
4 attorney for Chula Vista at that time.

5 THE WITNESS: Jonathan Alcott (phonetic).

6 Q. Did they make any -- why was this letter sent to the
7 Olsons?

8 A. They were explaining in legal terms they were not
9 in compliance with the CC&Rs and explained to them what
10 they had to do to come into compliance and what might
11 actually happen if they did not come into compliance.

12 Q. What did the Olsons need to do to come into
13 compliance?

14 A. Construct a permanent residence on your lot, to
15 vacate the outbuilding which is known as an injunction under
16 Arizona law.

17 The association would be forced to recover its
18 attorney fees incurred in obtaining the injunction.

19 Q. Exhibit 22?

20 A. Yes.

21 Q. What is this?

22 A. This is a letter in February 6, 2015 from their
23 lawyers -- sorry -- yes, from their lawyers Stachel and
24 Associates in response to the letter we sent.

25 Q. The second sentence of the first paragraph -- read

1 through that quickly.

2 A. "The Olsons are well aware that a three year
3 variance which your client originally requested expired in
4 March 2014.

5 However, they do not need to request an additional
6 variance because they are residing in their permanent home,
7 not an outbuilding."

8 Q. Had the association heard this from the Olsons
9 before they were living in their house and not an
10 outbuilding?

11 A. No.

12 Q. This was the first time the association was
13 informed?

14 A. Correct.

15 Q. What was the association's reaction to seeing
16 that?

17 A. I imagine they were quite angry. I wasn't on the
18 board at the time.

19 Q. Go down to the third paragraph, first sentence;
20 would you read that?

21 A. "We've reviewed the Chula Vista CC&Rs and found
22 relevant sections to be hopelessly vague and ambiguous.

23 Page 13 paragraph 2 of the amended --"

24 Q. Do you know what part of that language Mr. Stachel
25 was claiming was "hopefully vague and ambiguous"?

1 A. I believe it was first class that he didn't
2 like.

3 Q. In this board's opinion, is the term "first class"
4 hopelessly vague and ambiguous?

5 A. It is not.

6 Q. Exhibit 23 --

7 THE COURT: Let me ask a question:

8 Would steel be considered in your mind to be a non-
9 traditional building material?

10 THE WITNESS: Yes.

11 THE COURT: Go ahead.

12 Q. What is this document?

13 A. This is a letter from our lawyers dated August
14 17, 2015, to Mr. Stachel in response to his previous
15 letter.

16 Q. Second paragraph, the letter mentioned a June 15,
17 2015 meeting with the board and the Olsons. Discuss what
18 happened at that meeting.

19 A. We decided before we would try and take legal action
20 because we didn't want to do that.

21 We wanted to try to resolve this in some way that it
22 would work for all parties, the homeowners association and
23 the Olsons.

24 We were still sympathetic to the situation we were
25 facing.

1 We agreed to set up a meeting with two board
2 members, myself and Robert Volara (phonetic) who was a member
3 at large at the time and with the Olsons.

4 We asked if we should meet at their home but they
5 wanted to meet elsewhere, so we decided to meet at the fire
6 station and we discussed how we could beautify the outside of
7 the outbuilding to bring it more in keeping with the
8 neighborhood, aesthetics of the neighborhood.

9 And we explained we couldn't ever approve it but we
10 could give them a variance and possibly give them a long term
11 variance to live in there if we could do something to the
12 outside.

13 We gave them three options.

14 First option would have been to stucco the entire
15 building, to put faux finishes around the windows,
16 esthetically pleasing finishings on the corners and put a
17 wrap-around porch around the third the south and east third
18 portion where the house was, to make it look more like a home
19 not an outbuilding.

20 The second option would be instead of stuccoing the
21 whole building which would have been an expensive thing to do
22 was to take that third of the building, stucco half the way
23 up and put a trim and put trims on the side and architectural
24 details around the windows and put a wrap-around porch from
25 the south to the east.

1 And the third option was, which is the cheapest
2 option we thought, would be the wrap around porch on the
3 south and east section and some ornamental detail around the
4 windows and I think that was it, to be honest.

5 Q. What was the outcome of that meeting?

6 A. Unfortunately, when the Olsons arrived, they were a
7 little belligerent.

8 They were a angry and angry because I called their
9 home an outbuilding and that didn't set the tone
10 unfortunately.

11 They didn't want to look at the paper we had. They
12 didn't want to beautify the structure. They said the home
13 was beautiful as it was and they didn't see why they had to
14 do anything else.

15 They felt we were picking on them because Mr. McCoy
16 had a structure in the homeowners' association and we weren't
17 doing this there to him.

18 We explained that we had in researching that we
19 didn't have an outcome to that investigation, but we said it
20 is most likely grandfathered in because it came in before
21 the changes and even if it had been a mistake, the CC&Rs
22 allow for mistakes to occur but we truly believe from that
23 point in place prior before the change in CC&Rs.

24 We tried a few times to bring them back to the
25 beautifying of the structure and in the end Mrs. Olson said

1 she would take the paperwork with her and Mr. Olson said we
2 would hear from his lawyer.

3 Q. There were some changes after that.

4 Could you expand on what those changes were?

5 A. Looking through the paperwork because I wasn't
6 around in 2003/2004, looking through the paperwork and
7 documents at that time when I did the investigation, it was
8 very clear that the very first homeowners' association
9 meeting with the members in December, they received two
10 architectural review applications.

11 One was from the owner of the land, the beginning of
12 Chula Vista to put four manufactured homes and the other was
13 from Mr. McCoy to put up his structure.

14 And at that point they felt they didn't have
15 anything in the CC&Rs to prevent approval of those structures
16 so they had to go ahead and approve them.

17 But they immediately set about finding a way to
18 change the wording in the CC&Rs to prevent it happening
19 again.

20 Q. What did they update in the CC&Rs to help with
21 that?

22 A. Section 2 of the protective covenants they changed
23 the wording in there.

24 Originally, it said first class primary dwelling and
25 they changed that and they added site built. In the

1 terminology below they excluded manufactured home and modular
2 homes.

3 The reasoning behind that was they would exclude
4 pre-fabricated homes but they could still allow the
5 pre-fabricated homes as an outbuilding.

6 Q. Looking at the letter, turn to page 141 of the
7 second page of the letter.

8 There is a bolded sentence in there. Would you read
9 that?

10 A. "This letter shall serve as a ten day notice
11 required by article 4, section 4.2 of the CC&Rs.

12 Your client must either, one, remove the temporary
13 residence or two, commence the construction of a permanent
14 residence within ten days of this letter.

15 If your clients fail to do so, Chula Vista will
16 record a violation of covenants in the office of the county
17 recorder, Concise County.

18 If your clients fail to comply, they will be fined
19 one hundred dollars per month."

20 Q. Did the association record a notice of violation
21 against the property?

22 A. We did.

23 Q. Did the association receive a response to this
24 letter from the Olsons?

25 A. We did.

1 Q. Did they make any request in that letter?

2 A. They requested an open hearing before we fine
3 them.

4 Q. Did the board hold an open meeting for the
5 Olsons?

6 A. We did.

7 Q. Approximately when was that meeting?

8 A. October 15, I believe.

9 Q. Could you please inform us what happened at that
10 meeting.

11 A. The Olsons stated they were having their lawyer
12 present so we requested we have our lawyer present.

13 This is not something the board has ever handled
14 before and we asked the lawyer to help us to construct the
15 agenda for the meeting and how it would go down.

16 The president at the time addressed everybody at the
17 meeting and laid out how it was going to go forward; but he
18 would state the violations and the progress of what had
19 happened and the Olsons would have an opportunity to speak
20 and then it would be opened up to -- there would be questions
21 for the board and opened up to the public and then the board
22 would end the meeting and go and consult with the lawyers as
23 to how to proceed.

24 Q. Who presented the argument for the Olsons?

25 A. Mr. Stachel.

1 Q. Upon completion of the argument, what did the board
2 do?

3 A. The board opened it up for questions, had a call to
4 the public and closed the meeting and went to speak with our
5 lawyer.

6 Q. Did the board inform the audience it was going to
7 executive session to talk to the attorneys?

8 A. Yes.

9 Q. Were there any objections with the Olsons or Mr.
10 Stachel at that time?

11 THE COURT: I am confused. You said the board
12 adjourned the meeting and your lawyer said did the board go
13 into executive session which wouldn't necessary mean the
14 meeting was adjourned, that you would consult with the
15 lawyers and come back into open session.

16 Which was it?

17 THE WITNESS: Sorry. We had adjourned the meeting
18 and we went into executive session with a lawyer.

19 THE COURT: With no intent to re-open the meeting;
20 correct?

21 THE WITNESS: No, we didn't.

22 Q. After the board met in executive session and
23 discussed with their attorney, what happened after that?

24 A. The attorney said he had --

25 Q. After that?

1 A. We met at the meeting in November and we ratified
2 the minutes and then we went into executive session to
3 discuss the Olson case.

4 Q. What did the board determine regarding a notice of
5 violation?

6 A. That it would stay in place.

7 Q. And what did the board determine regarding
8 findings?

9 A. We would not change our status and is there had to
10 be an argument presented that would make us change anything
11 we decided.

12 Q. The board decided to levy fines against the
13 Olsons?

14 A. Absolutely.

15 Q. Exhibit 42, this document.

16 A. Yes.

17 Q. What is this?

18 A. This is the treasurer's record of dues and
19 assessments.

20 Q. As of June 17, what were the current fines levied
21 against the Olsons?

22 A. Nineteen hundred dollars.

23 Q. Just a few more questions.

24 If I could draw your attention to exhibit 27.

25 And on the third page of the appraisal report; would

1 you look at that.

2 A. Yes.

3 Q. Particularly --

4 A. Line 2 and 3?

5 Q. Yes.

6 A. This is in references to page 1 where the appraiser
7 has stated that the property generally conforms with the
8 neighborhood and said yes.

9 When the appraiser wrote in the uniform residential
10 appraisal report the appraiser assumed that there are hidden
11 or undercurrent conditions of the property such as structures
12 which would render it more or less valuable.

13 There is nowhere in this report that mentions that
14 this home is within a homeowners' association.

15 There is nowhere in this report where it states that
16 the structure that was built within the outbuilding was not
17 an approved structure or that they were living with a
18 variance and that would definitely have made a big effect on
19 the appraisal report.

20 Q. Drawing your attention to page 11 of the report, it
21 is Olson 164.

22 A. Yes.

23 Q. Particularly the first big paragraph references
24 Santa Cruz County.

25 What is contained in this paragraph?

1 A. All we could find was one sale of a similar type of
2 building such as the subject which was in the next county to
3 the west which was Santa Cruz County and this building is
4 twice as small as the subject and the living area finished
5 inside the building is one third the size of the finished
6 living area of the subject property.

7 Q. And subject property is the Olson property;
8 correct?

9 A. Correct. It states, "More sales and listings have
10 been searched for and no others were found with the exact
11 building type as the subject."

12 Q. The appraiser had difficulty locating a similar
13 property; would that indicate this property is what, a
14 traditional home, non-traditional home?

15 A. It would be a non-traditional home.

16 If they can't even find it within this county or
17 find it in the county next to, they could only find one which
18 wasn't really that similar.

19 Q. Drawing your attention to page 25 Olson 178 of the
20 Olson appraisal.

21 Look at comparable sale number 1; which property is
22 this?

23 A. This is the closest they could possibly find, an
24 outbuilding with a residence inside.

25 It's in Sinoita, at least ten miles away from the

1 subject property and it is not within a homeowners'
2 association.

3 Q. If you had to classify this property, what would it
4 be?

5 A. It is an outbuilding.

6 Q. There is a couple other comparables listed here.

7 Do any of those come anywhere close to comparable
8 number 1, the Olson property?

9 A. No. They all have traditional homes.

10 Q. Comp number 3 on that page, do you recognize that
11 property?

12 A. On Yucca Springs Trail, Yes.

13 THE COURT: Whose property is that?

14 THE WITNESS: At the time it was the Powers.

15 It now belongs to -- I don't know the name, but it
16 just recently sold.

17 THE COURT: Is that fairly close to the HOA?

18 THE WITNESS: It is within the HOA.

19 THE COURT: Go ahead.

20 Q. This conflict has been going on for awhile since at
21 least 2011.

22 Why is the association and the board putting so much
23 energy and resources in trying to get this worked out,
24 getting it resolved?

25 A. Historically with every board, rather than have a

1 conflict, we try to work things out with our neighbors. It
2 is that kind of neighborhood.

3 And secondly if we were to allow them to live in
4 this, it would set a precedence and there would be nothing to
5 stop other people putting up outbuildings within the
6 community and living in those too, and that would take down
7 the values of the existing homes.

8 Everybody that came into this community came into it
9 signing on to the CC&Rs.

10 We saw the CC&Rs and we knew that was what we wanted
11 because we wanted to keep our property values up and we
12 wanted homes that were built like the homes we were going to
13 be building.

14 There is the fact that I personally, when I was on
15 the board, was told by two homeowners they would sue if we
16 did not --

17 MR. STACHEL: Objection; hearsay.

18 THE COURT: Sustained.

19 THE WITNESS: And we have a concern about the
20 insurance premiums.

21 Q. Earlier in your testimony --

22 THE COURT: I am confused about that last statement;
23 what is your concern?

24 THE WITNESS: Our concern is that having looked at
25 this, the board did research into it and we have insurance

1 for directors and officers.

2 If we allow this to happen we don't counter-sue to
3 get the money back from the insurance payment.

4 They could and most likely will drop us in January
5 and we then would have a problem to get insurance again and
6 the premiums could go up four to ten times as much for the
7 first five years.

8 We would have to hit every single homeowner with a
9 special assessment for the next five years to help pay for
10 that.

11 So there is a lot more to this than just allowing
12 them to live there.

13 But if we could have found a way prior to the
14 lawsuit to make it happen, we would have done it.

15 Q. You indicated in your earlier testimony that you
16 have about 80 lots of which somewhere around 20 have been
17 developed.

18 What are the potential ramifications if the Olson
19 structure is found to be a first class building on those
20 future lots?

21 MR. STACHEL: Objection; relevance.

22 THE COURT: Overruled.

23 THE WITNESS: It would have a huge impact on the
24 property prices, property values and the ability for people
25 who have land to sell it.

1 I know personally the Oldfathers are struggling to
2 sell their property because it's right next to that building
3 and people take one look and that's not the view we really
4 want.

5 Q. Has the association been dealing with any other
6 properties like the Olson property?

7 A. Yes, indeed. Mr. and Mrs. Coffman had planned to
8 build their home and they had a similar situation.

9 They were -- an architectural review was approved
10 for the outbuilding and the future home and they built the
11 outbuilding and they didn't build a future home.

12 They still had plans to build a future home but
13 decided they would built a residence within the outbuilding
14 and live in that until such time as they would be able to
15 build a primary residence.

16 We had objected to that. We went through the same
17 procedure, issuing letters, lawyers letters.

18 We put a notice of violations in Concise County
19 records and they decided to buy a home somewhere else and
20 they moved out.

21 And we had the Concise County building inspector
22 come back and tell them what they had to remove from the
23 inside to get back to an outbuilding on land as opposed to a
24 primary residence and they went ahead and did that and we
25 took the rest of the violations off.

1 Q. The association has experience in enforcing section
2 2?

3 A. Correct.

4 Q. Are you aware of any other properties that may have
5 this issue coming down the road?

6 A. We do. Both Mr. and Mrs. Coffman and the Sheets
7 (phonetic) next to them. They are much smaller outbuildings,
8 but they haven't built their home yet and if the Olsons were
9 to get away with this, they would not bother building.

10 They would just move into their outbuilding and both
11 stated that was the case.

12 Q. One last question. We saw pictures and the Olson
13 property had some improvements recently. This is within
14 maybe the last month or two.

15 The current state this property is at if this was
16 applied for today, would the board consider this to be a
17 first class dwelling?

18 A. No.

19 MR. TENNESON: Nothing further.

20 THE COURT: Why is that?

21 THE WITNESS: It is still an outbuilding.

22 It's still a 60 by 100 commercial warehouse and it
23 is not aesthetically pleasing to look at and it doesn't match
24 the other traditional homes in the community.

25 THE COURT: If you stuccoed that, it would still be

1 in the same shape?

2 THE WITNESS: Well, we would like them to stucco it
3 and put a wrap around porch which gives it more definition
4 and it makes it look more like a home than instead of a
5 warehouse and we asked them if they would plant trees.

6 THE COURT: On the wrap around porch, a balcony type
7 porch?

8 THE WITNESS: If they wanted they could incorporate
9 a small balcony on the porch.

10 THE COURT: This is the southern exposure?

11 THE WITNESS: There is a southern exposure.

12 THE COURT: You would want that porch on that side
13 as well as the eastern side?

14 THE WITNESS: Only one third of the eastern; the
15 portion that is the home.

16 THE COURT: Because the remainder of the eastern
17 have large roleup doors?

18 THE WITNESS: Correct.

19 THE COURT: You wouldn't expect that to be changed
20 in any shape or fashion?

21 THE WITNESS: No.

22 We had asked if they would plant trees along the
23 east side because that is where the house was going to be and
24 that would block the view of the building from the
25 Olefather's property.

1 THE COURT: Did you specify what kind of trees?

2 THE WITNESS: Similar to the ones they have on the
3 north.

4 They have a line of trees on the north that blocks
5 the south from the highway and it blocks the view from the
6 lot to the north evergreen trees.

7 We need them to be at least ten feet, six to ten
8 feet tall.

9 When you plant them, at least six feet in between.

10 THE COURT: There are a number of mesquite trees,
11 but that is not sufficient?

12 THE WITNESS: In the winter the mesquite trees, they
13 are not evergreen.

14 They are deciduous trees and they drop their leaves
15 and in that case you get a bad view in winter or all the time
16 actually.

17 THE COURT: Did you have an estimate of the cost of
18 this porch and the tree plantings because that was your third
19 option, what you referred to as the cheaper option?

20 THE WITNESS: Not a definitive one.

21 I spoke to my own builder and he had given me a
22 ballpark figure.

23 It could be done for around 70,000 but I hadn't seen
24 the elevations or the plans or whether the facade would be
25 aesthetically pleasing at that price.

1 THE COURT: If you are using that definition, we
2 could have 15 people and everybody would have a different
3 opinion about what looks good or what is pleasing?

4 THE WITNESS: Yes. We actually had pictures we
5 presented as to what the board felt would be the solution
6 that would work.

7 THE COURT: Go ahead.

8 Q. One last question:

9 In regard to talking about beautification and
10 balconies, the board has been focused on a wrap around or
11 patio.

12 What is the reason for wanting that kind of depth
13 and profile?

14 A. We wanted it to look more like a home or house or a
15 traditional house than a commercial warehouse.

16 Q. Does that requirement have any particularity based
17 on the lay of the land in Chula Vista which you can see from
18 various points?

19 A. Absolutely. Although this is on the edge of the
20 community which we are very thankful for -- it is not right
21 in the middle.

22 The way the land lies, it sits elevated. The north
23 portion of Chula Vista Subdivision is elevated so as you get
24 into the community further down the community, it becomes
25 more and more visible.

1 Q. As you get further down, what part of the building
2 can you see?

3 A. You don't see the lower windows or the grass or the
4 patio.

5 You see the upper, maybe two-thirds of the
6 building.

7 Q. You see the door to nowhere and the roof?

8 A. Right, yes.

9 MR. TENNESON: Nothing further.

10 THE COURT: You heard Mr. McCory said he couldn't
11 see it from his property, so you disagree with him?

12 THE WITNESS: No. Mr. McCory is actually very
13 lucky.

14 There is a water table that runs under Chula Vista
15 and some places, some property have really large trees and he
16 is to the far east of this property and his property and the
17 property in front of his have large trees.

18 So this would be the Olsons and he is down here so
19 you have these vast expansive trees and the elevation is not
20 that different.

21 The elevation changes as you go south.

22 THE COURT: Final question: Going back to cross
23 examination, if they did what you asked put on this porch,
24 planted the trees, everything would be fine?

25 THE WITNESS: We would issue them with a long term

1 variance.

2 THE COURT: What do you mean?

3 THE WITNESS: It would mean they would be allowed to
4 reside in the property.

5 We would not approve the structure as a first class
6 site built residence.

7 They would be allowed to reside in the property. It
8 would go with the land so, if they sold it, the next people
9 would be allowed to reside also.

10 THE COURT: Would you withdraw your notice of
11 violation?

12 THE WITNESS: We would.

13 THE COURT: Clear up any incumbrance to either liens
14 or sale of the property?

15 THE WITNESS: Correct.

16 THE COURT: But you wouldn't approve it?

17 THE WITNESS: We couldn't.

18 THE COURT: For how long would they be allowed to
19 live there, 25 years, 50?

20 THE WITNESS: We had decided it would run with the
21 land so it would be --

22 THE COURT: A permanent variance?

23 THE WITNESS: Permanent, yes.

24 THE COURT: How would this protect the board from
25 all these other concerns you had regarding your insurance

1 losses by other homeowners?

2 How would that protect the board?

3 THE WITNESS: At this point, it would protect us
4 from the other lawsuits in that we would have by not allowing
5 it as a site built first class site built residence and just
6 giving a variance, we would actually be going with the
7 governing documents.

8 We would have held the governing documents because
9 we would not have allowed the structure or approved the
10 structure or approved the structure.

11 However, by giving a variance that is a long time a
12 one off and the way the CC&Rs are worded, we are allowed to
13 do that for certain properties; doesn't mean that it has to
14 apply to others.

15 THE COURT: What if the Coffmans say, Look, what you
16 did for this home owner; we want the same variance.

17 In what position would that put them?

18 THE WITNESS: It would be a very difficult one if
19 they sued us.

20 THE COURT: At least you would contain some control
21 over what you view as an essential element, that is the
22 appearance in trying to break up this, what you see as a
23 warehouse and they see as their home; right?

24 THE WITNESS: Correct; it would be a compromise.

25 It wouldn't be the best solution but it would be a

1 compromise.

2 It would be hard for us to sell this to our
3 homeowners but, at the end of the day, we would like to try
4 to resolve it so --

5 THE COURT: Would it have to go to the homeowners or
6 would the board approve it?

7 THE WITNESS: The board has the right to make the
8 decision and the board would make the decision but we would
9 have to let the homeowners know what we had done.

10 THE COURT: Anything further, based on my questions,
11 counsel?

12 MR. TENNESON: Nothing further.

13 MR. SMITH: I have a few.

14 BY MR. SMITH:

15 Q. Ms. Cunningham, you have been a real estate agent
16 how long?

17 A. Since 2006.

18 Q. In your job as a real estate agent, have you had
19 occasion to review CC&Rs for other HOAs?

20 A. Absolutely.

21 Q. An allegation in this lawsuit is that the first
22 class designation, your description of what is approvable is
23 too vague to be understood or enforced.

24 Have you by any chance looked at other architectural
25 approval processes and other HOAs, CC&Rs as part of your

1 job?

2 A. Yes.

3 Q. What other language have you seen in those CC&Rs;
4 can you tell us?

5 A. Very similar. They will allow -- they don't want
6 every home to look exactly the same.

7 In the rural developments in particular you have
8 first class -- here we go again -- first class subdivisions
9 within the cities where they require every house to look the
10 same, to be painted the same and the gardens have to look the
11 same.

12 And in the rural development we want to get away
13 from that and we want to allow the homeowners to come up with
14 their idea of what a home is but we still have to have
15 standards so the terminology is usually written in such a way
16 to allow for that.

17 Q. Have you seen language like in keeping with the
18 harmony or character of the neighborhood to describe those
19 architectural processes?

20 A. Yes, indeed.

21 Q. Those are a little vague as well?

22 A. They are.

23 Q. Is it your opinion as a board member, isn't that
24 part of the idea of architectural process is that the board
25 has discretion to review a variety of things that might, an

1 owner may want to do with their property and to have
2 flexibility in exercising that discretion?

3 A. That's correct.

4 Q. The last thing to ask you about in respect to
5 defending the claims against the association, much has been
6 made about the notice, the notice of violation that the
7 association recorded.

8 The 2009 architectural approval has never been
9 complied with; correct?

10 A. Correct.

11 Q. And that is the violation as you see it?

12 A. Yes.

13 Q. And as you see it, the notice of violation is
14 highlighting that non-compliance with the 2000 --

15 MR. STACHEL: Objection; leading.

16 THE COURT: Sustained.

17 Q. What is the basis for the notice of violation?

18 A. It is to notify them that they are in violation.

19 Q. Your CC&Rs, do they instruct you at all about filing
20 notices of violation?

21 A. Yes, they do. They allow it as a remedy to a
22 violation of the CC&Rs.

23 Q. What are the requirements to do that?

24 A. Again.

25 Q. What are the requirements in order to do that.

1 A. To do a notice of violation, we just have to tell
2 them you violated the CC&Rs.

3 Q. Exhibit 23 which has been talked about before is a
4 letter from the association's legal counsel.

5 That was the notice required by the CC&Rs?

6 A. Yes, indeed.

7 Q. Is it fair to say -- explain to me why you think you
8 have grounds to report a notice of violation?

9 A. We have on a number of occasions informed them that
10 they are in violation.

11 They have not responded and we've tried to work with
12 them and they still wouldn't respond.

13 Since they still are in violation and we have a
14 problem, we have to enforce the governing documents.

15 That is an allowable way of enforcing the governing
16 documents and we decided that was the way to go rather than
17 take them to court.

18 Q. This exhibit 23, your attorney has drafted the
19 letter.

20 Did your attorneys tell you there were no grounds to
21 record the notice of violation?

22 A. No.

23 They told us we had grounds to record this notice
24 of violation and we were on solid ground is the way they put
25 it.

1 Q. Did you rely on that counsel in preparing the
2 recordings of notice of violation?

3 A. Yes, indeed.

4 THE COURT: Anything further?

5 MR. SMITH: Nothing further.

6 THE COURT: We'll take the morning recess and come
7 back for cross examination. Thank you.

8 (The court recessed, proceedings resuming
9 as follows:)

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1 THE COURT: Mr. Stachel, cross-examination.

2 CROSS EXAMINATION

3 BY MR. STACHEL:

4 Q. On direct examination, we were talking about the
5 board of the directors?

6 A. Yes.

7 Q. You said you joined the board in 2005 through 2007
8 and 2009 through 2011 and 2015 to the present. When in
9 2015?

10 A. I believe it was May.

11 Q. Who was on the board at that time?

12 A. Christopher Zimmerman for sure and Al Shuhider
13 (phonetic) when I came on.

14 Q. The period of time. You said you came on in
15 approximately May of 2015?

16 A. Yes.

17 Q. May of 2015 through the current election in December
18 2016 who was on the board?

19 A. Myself, Robert Guera, Charlette Porto, Chris
20 Zimmerman was on then; he came on December 2016. And there
21 was somebody else.

22 Q. Are you related to Mr. Zimmerman?

23 A. He is my husband.

24 Q. Do you own property together?

25 A. Together.

1 Q. Two out of three of the board members or two out of
2 five are in one family?

3 A. Correct.

4 Q. You said there were 81 lots; 28 are developed?

5 A. Around 28.

6 Q. How many total homeowners or property owners?

7 A. I don't have the roster in front of me. Wait a
8 minute.

9 Q. An approximation?

10 A. Probably around 56 or 57 I want to say.

11 Q. You talked about the CC&Rs.

12 You were asked questions by counsel regarding
13 other CC&Rs from other homeowner associations you may have
14 seen?

15 A. Yes.

16 Q. You talked about things like others might say things
17 that conform with the development?

18 A. Correct.

19 Q. Is that language in your CC&Rs at Chula Vista?

20 A. It is not.

21 Q. What is the minimum home size in Chula Vista?

22 A. We have no minimum.

23 Q. And maximum?

24 A. We have no maximum.

25 Q. Particular maximum height?

1 A. County regulation we go with.

2 Q. Do CC&Rs dictate?

3 A. No.

4 Q. Do they identify or define an aesthetically
5 pleasing, the phrase?

6 A. No.

7 Q. Do they define keeping with the neighborhood
8 look?

9 A. No.

10 Q. When you purchased your property, I think you said
11 it was 2004?

12 A. 2005, yes.

13 Q. When you acquired there, you knew there were mobile
14 homes?

15 A. We knew there were manufactured houses.

16 Q. You knew about the McCory property; it was there?

17 A. I did not see the McCory property I must admit when
18 we bought.

19 Q. At some time you have seen it?

20 A. Oh, yes.

21 Q. Are you familiar with the phrase in the protective
22 covenants that says that it's a covenant running with the
23 land?

24 A. Correct.

25 Q. Did you understand that to mean that it goes from

1 person to person, whoever buys the property buys it with the
2 CC&Rs and protective covenants in place?

3 A. Correct.

4 Q. Are you under the understanding that each individual
5 owner has their own obligation and right if they choose to
6 either enjoining conduct or to seek any other remedies
7 against any other owner?

8 A. Correct.

9 Q. Do you see where that would be difficult for each
10 owner to do if there is a phrase such as first class?

11 A. I don't know what you mean.

12 Q. For example, we have to look at what the intent of
13 the parties were at the time of the contract.

14 That is what we do in evaluating contract terms;
15 correct?

16 A. Correct.

17 Q. The intent of the parties at the time of the
18 contract would have been Mr. Martin at the time he created
19 the CC&Rs in 1999?

20 A. Correct.

21 Q. He amended them in 2000, 2001 and again it was an
22 HOA amendment in 2004 and 2007?

23 A. Yes.

24 Q. But you talked before about this concept of
25 remedying a problem. The problem was manufactured homes;

1 correct?

2 In 2004 the HOA wanted to eliminate the ability to
3 in new mobile or manufactured homes?

4 A. Correct.

5 Q. Clarifying, is it is your testimony today that in
6 your review of the documents, the HOA intended to eliminate
7 the possibility of a repeat of the McCory property?

8 A. It is my understanding from him speaking to board
9 members at that time.

10 Q. Have you ever looked at the documentation that was
11 created, for example the 2004 agenda for the meeting that was
12 held?

13 A. Yes.

14 Q. Did you look at the minutes?

15 A. I did.

16 Q. Did you see anything in the minutes or the agenda
17 that discussed eliminating the possibility of another McCory
18 property?

19 A. I have not got them in front of me.

20 Do you have a copy?

21 Q. Approach.

22 THE COURT: These are not exhibits.

23 MR. STACHEL: These are not in the numbers. If I
24 could have number 51 marked for identification.

25 They are documents.

1 (Exhibit 51 marked for identification.).

2 Q. Showing you plaintiff's exhibit 51.

3 Look at that and tell me.

4 THE COURT: What is that?

5 Q. What is that?

6 A. The Chula Vista Homeowners' Association General
7 Membership Meeting 20 April 2004.

8 Q. Have you had a chance to look at this before this
9 trial today?

10 A. I'm sure I have seen it while filing documents,
11 yes.

12 Q. This was received from your counsel.

13 Would that have been a document you would have
14 provided to them?

15 A. I would have provided everything that they asked
16 for.

17 Q. Could you turn to look at the first page. That is
18 the agenda; right?

19 A. Yes.

20 Q. Second page, what is that?

21 A. Proposed changes to the CC&Rs.

22 Q. Those are the proposed changes.

23 This should look rather similar like the comparisons
24 we've looked at the other day; correct?

25 A. Yes.

1 Q. That is the hard language of what was presented and
2 there were a couple of choices?

3 A. Yes.

4 Q. What were the two, if you can paraphrase?

5 A. Proposal one was a site to change it to our site
6 built only and to manufactured homes and modular homes as an
7 exclusion and proposal to year restriction on modular,
8 manufactured homes, changed or changing the current year and
9 age of the manufactured homes.

10 Q. In the 2001 amendment, it changed the year,
11 Mr. Martin changed the year from 1998 to 2000?

12 A. Right.

13 Q. The second proposal that was to take out this
14 reference to continuous year and say current year?

15 A. Correct.

16 Q. But the first proposal was to add the phrase "site
17 built" and delete or remove the manufactured home, modular
18 home as an acceptable structure; right?

19 A. What I'm reading here is that it is going to exclude
20 the use of the following types of the following homes,
21 modular homes, manufactured homes.

22 Q. It would treat them the same as it treats A-frames
23 and geodesic?

24 A. Yes.

25 Q. And add the phrase "site built"?

1 A. Yes.

2 Q. And that was the agenda in the proposed CC&Rs?

3 A. I believe so, yes.

4 Q. There was a proxy provided for voting next?

5 A. Correct.

6 THE COURT: Any objections to 51.

7 MR. TENNESON: No.

8 THE COURT: Marked in evidence number 51.

9 (Plaintiff's exhibit 52 was marked for identification)

10 Q. Showing you number 52.

11 A. Looking at that -- long reading. I apologize.

12 Q. Do you recognize the document?

13 A. I have seen this document, yes.

14 Q. Would you identify it as a general membership
15 meeting minutes?

16 A. Of April 20.

17 Q. 2004?

18 A. Correct.

19 Q. Looking at page 2, top of the page, agenda item
20 appears to be a vote on one of the items to change the CC&Rs.
21 Do you see that?

22 A. Yes.

23 Q. Read after it says agenda item a.

24 A. "Regarding CC&Rs change allow manufactured homes
25 versus site built only requested by Mr. Smith. That vote can

1 done by a roll call and results put in the minutes."

2 Q. From your tally of the votes, it passed?

3 A. It says 54, no, to allow manufactured homes and 22
4 yes for site built.

5 Q. It was actually recorded in a rather strange way;
6 correct?

7 A. Yes; it was odd.

8 Q. Is there anything in this agenda item a which was a
9 change to the CC&Rs, anything there that affects or in your
10 mind and understanding of this that says anything about a
11 property such as Mr. McCory?

12 A. I don't see any reference to Mr. McCory.

13 Q. It only refers to and intends to restrict
14 manufactured homes; correct?

15 A. It was, a straw vote wasn't it, for just with the
16 people.

17 I believe Mr. Smith had stood up the and asked if we
18 could have a straw vote of people who were actually at the
19 meeting.

20 Q. My question is simple. With regard to agenda item
21 a, is that what effectuated the change to the amendments for
22 the 2004 amendment to paragraph 2?

23 A. I wasn't on the board and wasn't at the meeting. I
24 have no idea.

25 Q. You don't know whether the vote that is reflected in

1 the minutes of the 2004 meeting is a representation of the
2 changes in section 2?

3 A. My understanding from this is that Mr. Smith stood
4 up at the meeting and you would have to ask somebody who was
5 there.

6 My understanding Mr. Smith stood up and asked if
7 they could do like a straw vote of the members who were
8 present, whether they should allow manufactured homes or site
9 built only.

10 There had been some discussion and I wasn't privy
11 to that discussion that they were going to insert the roll
12 call, but my understanding is they just decided to put the
13 results from the actual vote in instead of from the straw
14 vote, but I suppose that is hearsay. I don't know. I wasn't
15 at the meeting.

16 This particular agenda item a was a straw vote but
17 the results written in an odd way is actually the result from
18 the CC&Rs change, the actual homeowners total, all the
19 homeowners voting.

20 Q. My question to you is this:

21 You saw the first plaintiff's exhibit 51 as that was
22 the agenda item for the meeting; correct?

23 A. Yes.

24 Q. That was the agenda contained a statement of the
25 change in the CC&Rs as a proposal?

1 A. New Business. I see the proposal under New
2 Business.

3 Q. And the second page of plaintiff's 51?

4 A. Right.

5 Q. That is the proposed language changes?

6 A. Correct.

7 Q. And the meeting was held and I'm asking to the best
8 of your knowledge was at that meeting a vote taken of the
9 membership to change the CC&Rs specifically protective
10 covenant section 28?

11 A. I believe if it was the annual meeting -- well, I
12 honestly, to be honest, I have no idea.

13 This was not the annual meeting and CC&R changes are
14 usually made at the annual meeting.

15 I don't have all the paperwork here. I think this
16 was a straw vote of the people, but I don't know when the
17 actual voting occurred.

18 Q. You weren't a property owner at the time?

19 A. I wasn't.

20 Q. As a secretary, were you able to understand -- I
21 will reserve the question for someone else who might know.

22 A. Yes; I don't know.

23 Q. You are held as the board of representatives and as
24 the secretary you were able to locate these documents;
25 correct?

1 A. Yes.

2 Q. As best you can tell from plaintiff's exhibit 52
3 what it says is general membership meeting April 20.

4 Meeting convened at 6:35 p.m. Wetstone Fire
5 Department. Does that read as though it is the minutes of the
6 meeting?

7 A. Of the general meeting, yes.

8 MR. STACHEL: Move for admission of plaintiff's 52.

9 MR. TENNESON: No objection.

10 THE COURT: Admitted.

11 Q. Referring back to section 2 and your discussion
12 earlier with counsel, you mentioned that there was something
13 occurring in 2004 you believe would stop a future
14 construction similar to the McCory property.

15 What were you referring to?

16 A. Am I allowed to answer this since it is hearsay. I
17 did an investigation on the McCory property and I spoke to
18 previous board members.

19 Q. You looked at documents?

20 A. I looked at some documents, but I did not have the
21 architectural review paperwork of Mr. McCory.

22 Q. Have you found it since?

23 A. No. Most of the architectural review paperwork went
24 missing. The management lost them.

25 Q. Do you have copies of any kind to show there was a

1 architectural review?

2 A. Yes.

3 Q. What is that?

4 A. The minutes from the meeting I believe in December
5 2003 when it was submitted.

6 Q. The meeting minutes would show it was approved?

7 A. It was, yes.

8 Q. Do you have any documents from the board in the way
9 of minutes or changes of CC&Rs that reflect a change in what
10 is acceptable construction after McCory that would make his
11 property never happen again?

12 A. I would have to review the documents.

13 Q. But the 2004 CC&R changes to paragraph 2 of the
14 protected covenants didn't do it. That didn't affect the
15 McCory property or future property?

16 A. My belief is that their intent -- I wasn't there.
17 My belief is that their intent having spoken to the board
18 members was that would make the change because when they
19 added site built and added excluding modular homes, that
20 would exclude pre-fabricated buildings being site, a home as
21 opposed to an outbuilding.

22 Q. You have been making architectural decisions and
23 one is you don't want to have the McCory structure happen
24 again?

25 A. As an outbuilding, we would probably approve it.

1 Q. As a residence?

2 A. We would not allow that.

3 Q. Because of which particular change in the 2004
4 amendment would you do that; is it the phrase "site built"?

5 A. It is when they added site built to the entire
6 phrase.

7 Q. Why is the McCory building not site built?

8 A. It is site built, but it is not -- it is excluded as
9 a home because of the exclusion of modular homes.

10 A modular home is by its very definition a
11 pre-fabricated building that is brought and constructed on
12 site.

13 We then by changing the terminology in that one
14 sentence, they excluded prefabricated building being brought
15 and constructed on-site as a home as opposed to bringing them
16 on as an outbuilding.

17 Q. Wouldn't you agree a modular home is a structure
18 that is manufactured elsewhere; right?

19 A. It's a factory built and it comes in modular --

20 Q. Let's describe them. They are finished, insulated.
21 They include conduit and electrical outlets. They are all
22 set.

23 All you have to do is set a wall and it is finished;
24 correct?

25 A. They are actually constructed but you have to put

1 them together, yes.

2 You take the modular however many you can bring in
3 and you put them together on site.

4 Q. And built it?

5 A. And built it by the pre-fabricated building.

6 Q. How is that different from plywood?

7 A. I beg your pardon?

8 Q. From metal roofs that you have out in abundance in
9 that subdivision?

10 A. A metal roof is a building material made of metal,
11 but it is not a pre-fabricated building.

12 Q. When the judge asked you whether you considered
13 metal a non-traditional building material, you said yes?

14 A. It is, to me, in this area in particular
15 traditionally homes are built with wood and there are more
16 and more homes being built with steel frames but as of now
17 traditionally homes in this area are built with wood
18 frames.

19 Q. You believe that paragraph 2 excludes metal?

20 A. It does not exclude metal as a building
21 material.

22 Q. By not excluding metals, are you suggesting that it
23 is a non-traditional?

24 A. As I said, traditionally in this area homes are
25 built with wood construction, not metal.

1 Q. Anything other than wood construction would be
2 non-traditional?

3 A. Yes, in this area.

4 Q. Turn to exhibit 9, last sentence, paragraph 2, page
5 14, Protective Covenants, paragraph 2, last sentence.

6 A. Yes.

7 Q. Would you read it.

8 A. "This restriction is not intended to exclude homes
9 built of non-traditional building materials such as a adobe,
10 round out or straw bale."

11 Q. Is that an exhaustive list?

12 A. No.

13 Q. It says such as?

14 A. Correct.

15 Q. And they would be acceptable?

16 A. Correct.

17 Q. Metal as a structure is acceptable?

18 A. Correct.

19 Q. Therefore metal as a structure and as used in these
20 CC&Rs is acceptable in Chula Vista?

21 A. Correct.

22 Q. If you take this structure of the Olsons and stucco
23 it, are you trying to hide the metal?

24 A. We are trying to produce an aesthetically nice
25 facade.

1 Q. From a quarter mile away could you see whether that
2 was stucco or not?

3 A. I would say so, yes.

4 Q. You think you can?

5 A. I think so; I'm trying to think. In town when I
6 pass these structures, I can tell the ones like Family Dollar
7 definitely looks like that and some of other ones being built
8 like that and stuccoed look very nice.

9 Q. Look at paragraph 21?

10 THE COURT: Hold on because I did hear somebody in
11 the audience mention something. Not allowed.

12 If it happens again, whoever did that and I'll ask
13 the bailiff to be aware if somebody makes a comment you will
14 be asked to leave the courtroom.

15 This isn't a free for all game where people
16 participate and agrees or disagrees.

17 We have questions and answers. Be aware of that and
18 I appreciate it. Go ahead.

19 Q. Regarding paragraph 21, a couple pages further on
20 exhibit 9.

21 A. Yes.

22 Q. It talks about this is the part that says it is
23 running with the land. Do you see that?

24 A. Yes.

25 Q. And each person has an opportunity as an owner to

1 enjoin or remedy any appropriate proceedings of any violation
2 of the covenants; agree?

3 A. Yes.

4 Q. You said you were concerned about the board being
5 sued for if you somehow approved the Olson home?

6 A. Yes.

7 Q. You could be sued but each owner has its own
8 individual right to bring an action against the Olsons if
9 they chose to?

10 A. Absolutely.

11 Q. And they would have the same issue to define for
12 themselves first class; correct?

13 A. Yes.

14 MR. SMITH: Objection; that decision is already made
15 by the architectural committee before the house is built.

16 THE COURT: Overruled.

17 Q. Regarding the architectural committee, where are
18 they provided for in the CC&Rs?

19 A. I believe it is in the bylaws or the articles.

20 Q. Have you had a chance to read them?

21 A. Yes.

22 Q. Is there anything in the CC&Rs that provide the
23 board with an unfettered absolute discretion to approve or
24 disapprove?

25 A. If they are the architectural review committee.

1 Q. Asking about what is in the CC&Rs is there anything
2 that provided the architectural committee or the board an
3 opportunity for its own discretion to approve or deny an
4 approval of a house?

5 A. Can I read them again because it is very extensive
6 document.

7 Q. From memory -- do you have a memory of that?

8 A. I have a memory but it is full of a lot of
9 information but right now I cannot comment on it.

10 Q. We'll come back. You mentioned a phrase, talking
11 about setting a precedent and you said the phrase if the
12 Olsons were allowed to get away with this; what is that?

13 A. Violating the CC&Rs.

14 Q. Or living in a structure that is already approved?

15 A. Violating the CC&Rs.

16 Q. This structure, 6,000 square foot structure, is
17 there?

18 A. Yes.

19 Q. Are you asking this court to order its removal?

20 A. No. It was approved as an outbuilding.

21 Q. The 6,000 square foot structure no matter what will
22 be there?

23 A. Correct.

24 Q. The Olefathers your client or former client -- it is
25 there?

1 A. Originally when the architectural review paperwork
2 came in, the home was, the plan was for the home to be on the
3 east side and it pretty much covered the entire of the east
4 side.

5 I know there the paperwork here it shows it is in a
6 different position but the paperwork we received showed the
7 site built home all the way along the east side of that
8 building and it would have detracted from the view of the
9 warehouse.

10 Q. What was the time frame upon which the Olsons were
11 to build the primary residence?

12 A. There wasn't one.

13 Q. Could have been ten years or twenty years. There
14 was no time frame. It wasn't in the application or
15 architectural request.

16 There was no time frame for building another
17 structure?

18 A. There wasn't.

19 Q. The approval of the 6,000 square foot structure
20 could stand as it is and stand there forever without any
21 other structures around it?

22 A. The understanding from the Olsons when they applied
23 was they would be building very soon.

24 Q. That was your understanding?

25 A. That was the board's understanding.

1 Q. Is that in writing anywhere?

2 A. It's not. We believed them to be honorable.

3 Q. In the Olson -- you're suggesting that they were
4 trying to get away with it. You're suggesting that their
5 request that the structure they have already built be deemed
6 first class. You believe that to be dishonorable?

7 A. It is an outbuilding. It was approved as an
8 outbuilding and not a residence.

9 Q. Your suggestion that they are asking to say things
10 have changed in our lives.

11 We've all been around the block. Things change,
12 peoples will make changes based on finance. You are an
13 agent. You know that; is that right?

14 A. Indeed.

15 Q. When the Olsons come to you and say we want that to
16 be our home now. The board needs to look at it as a request
17 as a site built home; correct?

18 Is your disapproval based on the fact it is not a
19 first class site built home or are you still upset that it
20 was approved as an outbuilding?

21 A. It's not a first class site built home. We as the
22 board have a fiduciary duty to all homeowners to uphold the
23 CC&Rs.

24 We are not allowed to take personal feelings into
25 consideration. However, we have are over several years tried

1 to work with the Olsons to find a solution.

2 Q. When you are trying to determine as you did before
3 first class site built and you are trying to -- how do you
4 understand what that is.

5 You looked at the 1999 CC&Rs, the 2001 and 2004;
6 correct. That is what you looked at?

7 A. Correct.

8 Q. You understand what I'm saying?

9 A. Yes.

10 Q. Isn't it fair to understand an interpretation of a
11 CC&R by what conduct the board has taken in the past with
12 regard to the same structure?

13 MR. SMITH: Objection; calls for a legal
14 conclusion.

15 THE COURT: Overruled; you may answer.

16 THE WITNESS: Well, we look at all the
17 documentation. We'll look at what other homeowners have
18 built within their subdivision and the vast majority, 99
19 percent of the, maybe not that.

20 The majority, every single one of the homeowners
21 since 2004 have built a beautiful custom home.

22 Q. That is not true?

23 A. Since 2004 we have had even when the manufactured
24 house burned down, we made them build a custom site built
25 home.

1 Q. You are not suggesting that the first structure
2 built on every lot even to this day is a first class site
3 built home?

4 A. My belief is that the ones that have been approved
5 since 2004 come under that first class site built traditional
6 dwelling.

7 Q. I'll approach.

8 THE COURT: My recollection was the Coffmans were in
9 the same situation and somehow they built an outbuilding
10 first?

11 THE WITNESS: They did.

12 THE COURT: Correct.

13 THE WITNESS: Their architectural review paperwork
14 was approved for a very nice site built home along with it so
15 that approval was for a site built home as well as the
16 outbuilding.

17 THE COURT: The same as the Olsons?

18 THE WITNESS: Exactly the same situation which is
19 why we --

20 Q. Which property is this?

21 A. That property belongs to the Sheets (phonetic).

22 Q. What is the structure?

23 A. It is exactly the same outbuilding as the Coffmans.

24 Q. And the Olsons or different?

25 A. They are very much smaller.

1 Q. Metal structure?

2 A. They are outbuildings.

3 Q. Is there a primary residence around it?

4 A. Not yet.

5 Q. That and the Coffmans, there are two examples since
6 2004 of structures built without primary residences that were
7 steel structures?

8 A. We will allow for an outbuilding to be built
9 concurrent with or prior to the site built homes as long as
10 the site built home is on the approval document.

11 THE COURT: If the Olsons built a 600 square foot
12 primary residence, would that comply with the CC&Rs?

13 THE WITNESS: It would but that is not what they
14 requested initially.

15 THE COURT: But would it comply?

16 THE WITNESS: It would comply.

17 THE COURT: As long as there is no minimum building
18 requirements from the county which -- do you know if there
19 are?

20 THE WITNESS: They may have a problem with the
21 structure within site of the outbuilding because any
22 accessory living quarters have to be -- I believe it is only
23 seventy-five percent of the primary dwelling so their primary
24 dwelling at this point would have to be I suppose right now
25 it is 2054.

1 It would have to be another 25 percent more or they
2 would have to remove part of the inside.

3 Q. To carry on a little bit. The judge asked you if it
4 was 600 square feet and they moved into the 600 square feet;
5 no problem; that will get approved?

6 A. It might well do.

7 Q. 400 square feet?

8 A. I imagine so.

9 Q. First class has no reference to size?

10 A. Well, no.

11 Q. It could be a show on TV; Tiny Homes?

12 A. I love them -- very beautiful ones.

13 Q. How does that affect --

14 THE COURT: I don't.

15 THE WITNESS: My daughter would like it.

16 THE COURT: It would fill up the space too quick.

17 Q. That doesn't stop the Olson structure from still
18 being there?

19 A. It's does not.

20 Q. If the Olsons built their 200 square foot home and
21 simply said to you that will be our guesthouse; we'll make
22 this the primary dwelling?

23 A. It would be a violation.

24 Q. The other way around, would it make the 200 square
25 foot home the primary residence and this is their guest

1 home?

2 A. They wouldn't be allowed to do that with the
3 county.

4 Q. That is a county problem?

5 A. It's a moot point if it wouldn't be allowed with the
6 county.

7 Q. Have you ever tried to get variances with the
8 county?

9 A. I have never seen it.

10 Q. My question to you is, if you take this structure
11 and stucco it, you won't be able to tell from a quarter mile
12 away whether it is stucco or not. It would be the exact same
13 color.

14 MR. SMITH: That is not the testimony given.

15 She did say she could tell it was not stucco.

16 THE COURT: Sustained. That was Mr. Stachel's
17 opinion. She could tell a quarter mile away.

18 THE WITNESS: With my glasses on.

19 Q. In the letter, exhibit 21, there is a letter issued
20 to the Olsons in January 2015.

21 Under direct, you mentioned there was another letter
22 after the expiration of the variance?

23 A. There were two.

24 Q. Where are they?

25 A. Are they in here; I believe they are they; they were

1 in ours.

2 Q. I am referring to letters that would have been
3 issued after the expiration of the variance which expired on
4 March 31, 2014?

5 A. Right.

6 Q. This letter was written January 2015.

7 A. Okay. Marvin Shultz sent one in I believe it was in
8 July.

9 Q. Where is the letter?

10 A. I believe it is in here; I have seen it.

11 Q. I can shorten this; it is not in the list of
12 exhibits.

13 A. I have it in my bags if you want to see it. I can
14 tell you what was in it.

15 Q. It wasn't written by you?

16 A. No; I wasn't on the board at that time, no. Well,
17 it was just that transition. It as when we were with a
18 management and the president asked the --

19 Q. You're saying there was a letter but it is not in
20 evidence today?

21 A. No.

22 Q. With regard to exhibit 21, it provided two choices
23 for the Olsons and they were submitted for additional
24 variance or vacate the building.

25 A moment ago, you explained to the judge that there

1 could be the concept of a variance that is permanent
2 essentially.

3 You mention a variance that you would give to the
4 Olsons if they beatified it in some way with a wrap around
5 porch and put stucco, et cetera on it and the board would
6 consider a variance and I think terminology was to run with
7 the land.

8 A. Excuse me. Can I ask you a question. It was from
9 the settlement and discussion we had but I am not sure I am
10 allowed to discuss that here.

11 THE COURT: If they have an objection your
12 attorneys, they will make it.

13 Answer the question unless there's an objection that
14 has been sustained.

15 We have been exploring and there have been
16 discussions regarding I understand some settlement
17 negotiations so far, but no objection to it so you may answer
18 unless there is an objection; sustained.

19 A. Okay. While we were having settlement court --

20 Q. I'm not asking for that. But a question because the
21 judge asked you and you mentioned something about variances?

22 A. Yes.

23 Q. I want to explore the concept. What are you
24 varying.

25 What issue in the protective covenants, what section

1 or language was it that you would consider issuing a variance
2 on.

3 A. We would be allowing them to remain in the
4 residence.

5 Q. You are varying first class?

6 A. We are not approving it as a first class site built
7 residence.

8 We would not approve it but we would give a long
9 term variance to allow them to remain in the structure.

10 Q. Trying to understand the concept.

11 A. I don't know what else to say.

12 THE COURT: My understanding would be that you would
13 be allowing them to continue the residence in something that
14 you consider less than first class site built?

15 THE WITNESS: Correct.

16 THE COURT: Does that help?

17 Q. Kind of. Lastly when we talk about the concept of
18 first class the judge mentioned a question to you before.
19 Said if there are 15 people, 15 different opinions.

20 Would you agree with that?

21 A. Correct.

22 Q. When there are 15 different opinions or in this case
23 you have you said 56 or 57 owners, each of them could
24 participate on the board of directors and be making rulings
25 as an architectural committee?

1 A. Yes.

2 Q. Is it possible that that board and body are going to
3 completely different over what the definition of first class
4 is?

5 A. It is possible.

6 Q. That has been the case since 2003?

7 A. It would be absolutely astonishing of five human
8 beings can sit down and discuss this and have the same idea
9 in their minds; that is why we sit there and discuss and come
10 up with a consensus.

11 Q. When you look at the terms of the CC&Rs and the
12 language of the phrase first class and the first board of
13 directors of the HOA approves the McCorry home is that not in
14 your opinion understanding of first class?

15 A. My understanding of the situation was the very first
16 time this board had ever had anything to do with a homeowners
17 association where you got hit on the first meeting with two
18 architectural reviews, they didn't fully understand the
19 wording. It was a difficult time.

20 We don't get any instruction on how to become a
21 board member but mistakes are sometimes going to occur and
22 they obviously looked at that terminology and decided it
23 wasn't definitive enough to prevent these structures in the
24 future and decided to change the wording to make it easier
25 for people to define that.

1 Q. With regard to the 2004 amendment, do you have any
2 understanding as to why in 2004 or since 2004 there has not
3 been a change in the specific exclusion of steel structures
4 that would be such as this, as a primary residence -- if the
5 McCory property is there and you are suggesting the board
6 wishes they never approved it, why not come up with specific
7 language to exclude it?

8 A. If you go into the community, you cannot see
9 McCory's structure from the road. It is hidden in the back
10 unless you were actually looking for the McCory structure,
11 you wouldn't actually come across it.

12 So I imagine most board members have never even seen
13 the McCory structure.

14 Until this all came about, this was the first,
15 McCory structure was brought up and actually the first time I
16 actually saw the McCory structure was when I investigated.

17 So I hadn't seen it when I came into the community
18 and had no knowledge until 2005 I believe when he tried to
19 run a business out of it. That was shut down.

20 Q. It was approved?

21 A. Apparently it was approved in 2003 or 2004.

22 MR. STACHEL: Nothing further.

23 THE COURT: Redirect?

24

25

1 REDIRECT EXAMINATION

2 MR. TENNESON: Yes.

3 BY MR. TENNESON:

4 Q. There have been discussion regarding the time limit
5 on the Olson 2009 application for the primary residence in
6 the outbuilding and there was no time limit set forth
7 anywhere.

8 That is a not really necessary. Haven't the Olsons
9 declared they have no intention of building that primary
10 residence set forth in the 2009 application?

11 A. Yes.

12 Q. And that was terminated; twenty years they wouldn't
13 be building?

14 A. Correct.

15 Q. In regard to the architectural application, let's
16 say the Olsons had still applied for the outbuilding, 6,000
17 foot square feet metal building and they had requested and
18 submitted plans for a 200 square foot house to live in.

19 Would the board still have considered -- what would
20 the board's determination be. Would they have approved it,
21 denied it?

22 A. I believe because I was on the board at the time, I
23 believe that probably they would have turned that down and
24 asked them to either change the size of the outbuilding or
25 change the size of the home because it would not be in

1 keeping with the rest of the community.

2 You would have a large warehouse and tiny little
3 house. I am just considering what the conversations were at
4 the time.

5 Q. The board would have considered the relative size of
6 the outbuilding in comparison to the primary residence?

7 A. Correct, because it has to be customary. It has to
8 be traditional.

9 It is not traditional. It is not customary or
10 traditional to have a warehouse in a tiny house so that would
11 have been taken into consideration.

12 Q. Finally, do you know what the requirements are for
13 amending the protective restrictions in the protective
14 covenants?

15 A. Yes. We have to have sixty percent of the
16 landowners to agree or to approve.

17 Q. You need sixty percent of the members of the
18 association?

19 A. Correct.

20 Q. When the CC&Rs were amended in 2004 and approved,
21 does that mean that sixty percent of the members came out in
22 favor of adding site built and precluding modular and
23 manufactured homes?

24 A. Over that, yes.

25 Q. If the association wanted to add in additional

1 exclusions or requirements or restrictions to the CC&Rs what
2 process is that?

3 A. It is very difficult. We have to meet and decide on
4 what the wording is going to be and it goes to legal review
5 and it comes back and we send it out to homeowners for their
6 review and if there are changes, make the changes and send it
7 back to the lawyers for their review and once the changes are
8 ready we have to put together a document and mail that, email
9 to the homeowners and request them to vote at the next annual
10 meeting.

11 It is very difficult to get that many people.

12 Q. Who makes the final decision on that change?

13 A. It would be the homeowners who would have to vote an
14 affirmative sixty percent.

15 Q. What percentage of the membership would have to vote
16 affirmatively in favor of that?

17 A. Sixty percent.

18 Q. It's difficult to get sixty percent of an
19 association membership to show up?

20 A. It is almost impossible.

21 MR. TENNESON: Nothing further.

22 THE COURT: You may step down. We'll take the noon
23 recess.

24 I will speak with the attorneys and we'll start back
25 at 1:30.

1 (The court recessed.)

2 (With regard to continuation of the bench trial, the
3 clerk's minutes read as follows:

4 After the conclusion of proceedings the court
5 conferred with counsel in chambers and advised defendants to
6 rest. Defendants thereafter rested their case and plaintiffs
7 would offer no rebuttal.

8 The court directed the parties to submit their
9 closing arguments and findings of fact and conclusions of law
10 by no later than Friday, September 15, 2017, at which point
11 the court shall take the matter under advisement beginning
12 Monday, September 18, 2017.)

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REPORTER'S CERTIFICATE

STATE OF ARIZONA)

COUNTY OF COCHISE)

I, KATHRYN ANDREW, RPR/CCR, HEREBY CERTIFY THAT
I WAS DULY APPOINTED AND QUALIFIED TO TAKE THE FOREGOING
MATTER;

THAT ACTING AS SUCH REPORTER, I TOOK DOWN IN
STENOTYPE NOTES THE TESTIMONY GIVEN AND PROCEEDINGS HAD;

THAT I THEREAFTER TRANSCRIBED SAID SHORTHAND
NOTES INTO TYPEWRITTEN LONGHAND, THE AFOREMENTIONED PAGES
BEING A FULL, TRUE AND CORRECT TRANSCRIPTION OF THE TESTIMONY
GIVEN AND PROCEEDINGS HAD.

KATHRYN ANDREW, RPR/CCR

CERTIFIED COURT REPORTER #50231